

<p>BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203</p> <hr/> <p>Petitioner:</p> <p>UNIVERSITY PRE-SCHOOL & KINDERGARTEN, INC.,</p> <p>v.</p> <p>Respondent:</p> <p>ARAPAHOE COUNTY BOARD OF EQUALIZATION.</p>	<p>Docket No.: 62701</p>
<p>ORDER</p>	

THIS MATTER was heard by the Board of Assessment Appeals on June 11, 2014, Debra A. Baumbach and Louesa Maricle presiding. Mr. Lester L. Cole appeared pro se on behalf of Petitioner, a closely held corporation owned by Mr. Cole and his wife. Respondent was represented by George Rosenberg, Esq. Petitioner is protesting the commercial classification of the subject property for tax year 2013 and requesting that it be reclassified to residential.

The parties stipulated to the assigned value of \$118,140 for the property for tax year 2013.

Subject property is described as follows:

**350 East Orchard Road, Centennial, CO 80121-1560
Arapahoe County Parcel No. 2077-22-1-05-016**

The subject property consists of a 2,688 square foot building constructed in 1960 on a 40,000 square foot parcel of land in a single family residential neighborhood. The property has an asphalt paved parking lot, a perimeter fence, and landscaping. The property is zoned NC18, a Neighborhood Conservation zone district in the City of Centennial.

Petitioner's representative, Mr. Cole, testified that the subject property was operated as a day-care center until it was closed in 2005. The building has been vacant since that time and has not been remodeled. The building is used only to store personal property and not for commercial storage. Mr. Cole and his witness, Mr. Mills H. Ford, a Certified General Appraiser in Colorado, both testified

that although the building was constructed as a day-care center, it was designed with the appearance of a residence so it could be occupied as a residence. Some modification for residential use would be desirable, but it has a full kitchen and two bathrooms. The day-care center use pre-dated the incorporation of Centennial as a City. Petitioner's witness, Mr. Ford, presented evidence and testimony regarding the current City of Centennial zoning and that commercial use is only allowed as a Conditional Use. In accordance with the City of Centennial's zoning ordinance, the property's Conditional Use as a day-care center expired in 2006, six months after the commercial operation had ceased. The owner of the subject property, and any other property with NC18 zoning, could apply for a new Conditional Use permit, but there is no guarantee it would be granted by the City. Because of the single family homes surrounding the subject property and noise and traffic complaints by neighbors when it was a day-care center, Mr. Cole testified he believes there would be significant opposition to any commercial use of the property. Petitioner has not applied for a new Conditional Use permit since the day-care center closed in 2005 and has no plans to do so. Mr. Cole testified that on the assessment date, the property did not have a Conditional Use permit and could not be used for any commercial purpose, but it could be used as a residence. Therefore, Petitioner believes the correct classification for the property is Residential.

Respondent claims the actual use of the property is the important consideration for ad valorem purposes, not a land use designation. Respondent cited the following authorities as support:

"Residential improvements" means a building, or that portion of a building, designed for use predominantly as a place of residency by a person, a family, or families. Section 39-1-102(14.3), C.R.S.

Commercial property includes all lands, improvements, and personal property used as a commercial enterprise. Commercial property may have one or more uses. Assessor's Reference Library ("ARL") Vol. 2, page 6.27.

Property is classified according to its use on January 1, the assessment date. ARL, Vol. 2, pages 6.1 to 6.3.

Once any property is classified for property tax purposes, it shall remain so classified until such time as its actual use changes or the assessor discovers that the classification is erroneous. Section 39-1-103(5)(c), C.R.S.

Respondent also cited: *Mission Viejo Co. v. Douglas Cty. Bd. of Equal.*, 881 P.2d 462 (Colo. App. 1994) as support for Commercial classification for the subject property based on actual use. In *Mission Viejo*, the Court upheld the reclassification of a former residence to Commercial for ad valorem purposes based, in part, on the change in actual use of the property from a residence to a community center for public use. *Id.* at 465.

Respondent presented Mr. Michael B. Williams, Residential Appraisal Assistant Supervisor with the Arapahoe County Assessor's Office, as witness. Mr. Williams testified that he physically inspected the subject property on March 13, 2014 and described the interior of the subject building as being typical of a day-care center facility. The building was being used for storage and there was no

evidence of any residential use. Zoning evidence was provided that the NC18 District allows single family residential homes and any housing types already existing in the neighborhood. It also allows existing neighborhood-supporting institutions. The witness testified that information he obtained from the City of Centennial zoning department described neighborhood-supporting institutions as day-care, schools, churches, and places of assembly. The witness concurred with Petitioner that the property was not in use as a day-care center on the assessment date, and under the zoning, a Conditional Use Permit would be required to operate the subject property as a day-care center or any other qualifying commercial use. The witness testified that based on his investigation, he concluded that the subject property did not meet the criteria to receive a residential land classification. Specifically, 1) a residential dwelling does not exist on the property because on the date of his inspection, the interior configuration of the building was typical of a day-care/school building; and 2) the use is other than residential because there was no evidence of the property being used as a residence. Although the building appeared to be used as a storage facility, its interior design was typical of a day-care/school building. Based on this evidence and giving weight to the fact that the building was not occupied as a residence on the assessment date, Mr. Williams concluded that the actual use of the property was commercial, not residential.

Petitioner presented sufficient probative evidence and testimony to prove that the subject property was incorrectly classified for tax year 2013.

The Board finds that there is no apparent dispute between the parties that the subject property has not been operated as a day-care center since 2005 and that the Conditional Use permit allowing that commercial use expired in 2006. The Board has relied on the ARL Use Determination guidelines, which state that the primary criteria for classification are as follows:

1. Determination of the current use as of the assessment date;
2. Determination of zoning and use restrictions;
3. Determination of the most probable use when the current use or zoning and use restrictions cannot be determined; and
4. Determination of reasonable future use.

ARL Vol. 3, page 2.3.

In addressing those criteria, the Board finds that the actual use of the property is only one of the relevant factors in determining classification. The actual use of the vacant property on the assessment date was for personal property storage. The Board was persuaded by Petitioner that the storage use was not commercial in nature and was consistent with items many homeowners might store. The Board finds that no commercial use of the property was allowed under the zoning on the assessment date and that although the taxpayer could apply for a Conditional Use Permit, obtaining that permit is not guaranteed and because of the surrounding uses, it may in fact be difficult to obtain. Therefore, the most probable use under the zoning is as a single family residence. The exterior building design is consistent with residential properties and although the interior layout would require some modification for residential occupants, the building does have most of the essential features of a residence and could have been occupied as a residence on the assessment date. Any remodeling would be consistent with the cost to cure functional obsolescence found in many

residences. Based on these findings, the Board concludes that the reasonable future use of the property is as a single family residence.

The ARL further states: “Evidence for determining actual use can include observations made during a field inspection, correspondence with the owner or other individuals, the legally permitted use, and the use for which improvements were constructed or later modified.” *ARL* Vol 2, 1-84 Revised 10-13, page 6.1. The Board finds that the legally permitted use of the property changed in 2006 when the Conditional Use Permit expired. In response to questions from the Board, Respondent’s witness agreed that the loss of the Conditional Use permit for commercial use of the property would be considered a change for the use of the property.

The Board was not persuaded by Respondent that the fact that the building was not occupied as a residence on the assessment date means that it did not qualify for Residential classification. The Board concludes that vacancy is not a determining factor in classification. The Board was also not persuaded that the use of the building to store personal property constituted a commercial use.

Further, the *Mission Viejo* case is factually distinguishable and therefore provides no support for Respondent’s position. In *Mission Viejo*, there was a change in use of the former residence from residential to commercial. *Mission Viejo*, 881 P.2d at 463. The area had been rezoned for commercial use, and the actual use had changed to a community center for public use. *Id.* The new zoning prohibited residential use. *Id.* at 465. Respondent has relied upon this case to claim that the actual use of the property is the important issue for ad valorem purposes, not the permissible use under the zoning. The Board disagrees. The Board concludes that both the actual use and the legally permitted use are relevant and in the case of the subject property, commercial use was not legally permitted on the assessment date. Further, as to the subject’s actual use, the Board found that the property has not been used for commercial purposes since 2005.

The Board concludes that the classification of the subject property should be changed from Commercial to Residential.

ORDER:

Respondent is ordered to reclassify the subject property from commercial to residential.

The Arapahoe County Assessor is directed to change their records accordingly.

APPEAL:

If the decision of the Board is against Petitioner, Petitioner may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-nine days after the date of the service of the final order entered).

If the decision of the Board is against Respondent, Respondent, upon the recommendation of the Board that it either is a matter of statewide concern or has resulted in a significant decrease in the total valuation of the respondent county, may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-nine days after the date of the service of the final order entered).

In addition, if the decision of the Board is against Respondent, Respondent may petition the Court of Appeals for judicial review of alleged procedural errors or errors of law within thirty days of such decision when Respondent alleges procedural errors or errors of law by the Board.

If the Board does not recommend its decision to be a matter of statewide concern or to have resulted in a significant decrease in the total valuation of the respondent county, Respondent may petition the Court of Appeals for judicial review of such questions within thirty days of such decision.

Section 39-8-108(2), C.R.S.

DATED and MAILED this 1st day of July, 2014.

BOARD OF ASSESSMENT APPEALS

Debra A. Baumbach

Debra A. Baumbach

Louesa Maricle

Louesa Maricle

I hereby certify that this is a true and correct copy of the decision of the Board of Assessment Appeals.

Milla Lishchuk
Milla Lishchuk

